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# In the Supreme Court of the United States

OCTOBER TERM, 1958

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JAMES CLIFTON HAWKINS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

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## BRIEF FOR THE UNITED STATES

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# BRIEF FOR THE UNITED STATES

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## OPINION BELOW

The opinion of the Court of Appeals (Pet. App. B 11-13; R. 56-58) is reported in 249 F. 2d 735.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1957 (R. 59). The petition for a writ of certiorari was filed on December 9, 1957, and granted on January 20, 1958. 355 U.S. 925. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether a wife may voluntarily testify against her husband in a criminal action, without his consent.

2. Whether petitioner was prejudiced by his wife's testimony.

## STATUTES AND RULES INVOLVED

1. The pertinent part of 18 U.S.C. 2421 provides:

> Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * *
>
> * * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

2. 18 U.S.C. 3771 provides:

> The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the Territory of Alaska, the district of the Canal Zone and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, and in proceedings before United States commissioners. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

3. Rule 26, Federal Rules of Criminal Procedure, provides:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

4. Rule 52(a), Federal Rules of Criminal Procedure, provides:

> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

## STATEMENT

Petitioner was convicted in the District Court for the Northern District of Oklahoma of violating the Mann Act and was given a sentence of five years imprisonment (R. 2-3). The charge was that on or about November 23, 1955, he knowingly transported for immoral purposes one Lola Fay Moudy in interstate commerce from Mena, Arkansas, to Tulsa, Oklahoma (R. 2).

1. The principal government witness was Lola Fay Moudy, a girl seventeen years old at the time of the occurrences in question. She testified that in November, 1955, she was living near Beachland, Oklahoma, and was working at a place called Dogpatch, which consisted of a tavern, where she was employed, a dance hall, owned by petitioner, and one house (R. 5-8, 28). She told petitioner that she wanted a job paying better money than she was getting at the tavern and he suggested that she should go to Tulsa and work with Jane Wilson. She understood this meant working as a prostitute. She did not know whether Jane Wilson was married to petitioner (R. 8-9).

Lola accepted this suggestion and she and petitioner set out in petitioner's car, an orange Cadillac with leopard skin seat covers and "Hawk" written across the back seat. They first stopped at petitioner's home in Hatfield, Arkansas, and then at a filling station in Mena, Arkansas, where a repair was made to the car (R. 10-12). They then drove on to Tulsa, arriving after midnight at a filling station in the outskirts, where petitioner made a phone call. About a half hour later, Jane Wilson and another girl, known to the witness only as Tommie, joined them (R. 12-13). Some time later, the three girls went to a room at the Corona Hotel in Tulsa. Jane told Lola how to act when she went into a room and how much to charge for dates (R. 13-14).

The next morning, Lola moved to the Bliss Hotel, where she registered as "Johnnie Maguire," a name which petitioner had suggested (R. 14-15, 21). She

stayed there a couple of nights and had a few dates, which led to her arrest (R. 15). She called the Corona Hotel and got Tommie, who came down and paid her twenty-five dollar fine. After that, Lola went to a rooming house, staying there one night. A day or so later, the three girls went to Fort Smith, Arkansas, in Jane's car. The next day, petitioner joined them and they spent a night together at Hot Springs. Lola then went back home (R. 15-21).

Various witnesses were called to corroborate this account. Tommie Alexander testified that she had formerly been a prostitute. In November, 1955, when she was staying at the Corona Hotel in Tulsa, she went with Jane Wilson, a friend of hers, to a filling station on the highway. A girl got out of a light colored Cadillac, driven by a man, and came over to their car. The girl was introduced as Johnnie Maguire. They took her back to the hotel and talked a while. A few days later they all three drove to Fort Smith, Arkansas. Tommie stated that she did not know if Jane was a prostitute and was not certain whether Jane was married to petitioner (R. 28-33).

The clerk at the Corona Hotel, in Tulsa, testified concerning the late telephone call to Jane Wilson, following which she and Tommie Alexander left and came back with a girl who they said was Johnnie Maguire. Johnnie had stayed there one night without registering. He thought that Jane Wilson and Tommie Alexander were prostitutes (R. 33-36).

The father of Lola Moudy testified to her leaving on a trip in a light colored car (R. 37-38). An attendant at a filling station in Mena, Arkansas, re-

membered the car, but was hazy as to other details (R. 38-39). The manager of the Bliss Hotel, in Tulsa, identified the registration card of Johnnie Maguire, dated November 24, 1955 (R. 42-43).

2. The issue in this case arises because the government called as a witness Erma Lane Hawkins, also known as Jane Wilson. At the outset of her testimony, this witness was asked on voir dire as to her marital relationship with petitioner. She stated that she had been married to petitioner on July 5, 1954, and had never been divorced. She said that they were not then living together as husband and wife, and that they had had a previous separation. Petitioner's objection to permitting her to testify was overruled by the court (R. 40-41).

She then testified that during November 1955 she was using the name of Jane Wilson. At that time she was a prostitute (R. 41). On cross-examination, she said that she did not live with petitioner for very long and was not living with him in November, 1955. She stated that she was not a prostitute at the time they were living together and that petitioner did not know about such activities on her part. On redirect examination, she said that she had worked as a prostitute before she met petitioner (R. 42).[1]

3. Petitioner, testifying in his own behalf, said that Lola Moudy had asked him several times if he could get her a job. He was going to Oklahoma City on

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[1] This witness was also recalled by petitioner in rebuttal, to testify that certain money she had sent petitioner after their separation was to repay him for money she had taken from his cash register (R. 54).

business and told her she could ride to Tulsa, where he would contact his "ex-wife" for her. His attorney corrected this slip of the tongue, and petitioner said that he and his wife had never lived together much (R. 46).

He said he did not know what business his wife was engaged in and added (R. 46):

> That's the main reason why I brought this girl up here, and got her, had my wife contact her, or her get in touch with my wife, so that I might find out if she was engaged in prostitution, since we were thinking about trying to make it again.

When he brought Lola Moudy back from Fort Smith, Arkansas, he found out that his wife had been engaged in prostitution (R. 47). He never discussed money or took any money from Lola Moudy (R. 47). The purpose of his trip, in addition to bringing her, was to pick up a deed in Oklahoma City (R. 47-48).

## SUMMARY OF ARGUMENT

The government's basic position in this case is that, while reason and experience justify the view that one spouse should not be compelled to testify against the other, a spouse who is willing to testify should not be debarred from doing so. In other words, we think the marital privilege should be that of the witness, and not of the accused. Preservation of the marital privilege in many jurisdictions, despite a considerable body of criticism, stems from the failure to make this distinction between compelling the spouse to testify and permitting her to testify if she is willing.

I

The central question whether to accept or reject the privilege of an accused to exclude spousal testimony is a matter on which this Court has great freedom to enunciate a rational rule, unfettered by common law practice. Rule 26 of the Rules of Criminal Procedure lays down a broad standard in such matters—that the Court shall be governed by the principles of the common law interpreted in the light of reason and experience. The cases which led up to this liberal standard, and those which have followed it, make it even clearer than the language of the Rule alone that the Court has wide power to mold the law on this subject.

II

Following this broad standard—guidance by reason and experience—the Court should reject the common law privilege *of an accused* against adverse spousal testimony, and should recognize that the privilege is that *of the witness-spouse.*

A. From the beginning, there has been a confusion of concepts which has led to unfortunate results and is still retarding needed reform. The common law *disqualified* both spouses from testifying in either civil or criminal actions. But there is a fundamental distinction between testimony which is *for* the other spouse and that which is *against* him. In the former instance, there was no longer any reason to exclude favorable spousal testimony when the common law disqualification because of interest was removed; and it has been so held. In the latter situation, where the testimony is unfavorable, there is certainly no

reason to exclude it if the spouses are willing to admit it. Therefore, the right to exclude is a true privilege, which many have said belongs to both spouses—the one who is a party and the one who is a witness.

We challenge the assumption that the privilege appertains to the defendant-spouse. The reasons supporting the privilege of the witness-spouse are not those which can be adduced to uphold the privilege of the accused. In the former case, there are potent reasons for the law's refusal to compel one spouse to be the cause of the downfall of the other, similar to the grounds which an enlightened jurisprudence recognizes in support of the privilege against self-incrimination. But, as we shall show, these considerations do not apply to the "privilege" of the accused to exclude unfavorable spousal testimony—an alleged privilege which is without comparable justification.

B. Since petitioner's separated wife testified voluntarily, the only question directly involved in this case is the accused's "privilege". Probably the earliest reason urged in support of that privilege was the common law unity of husband and wife, which no longer exists either factually or conceptually. Another reason is said to be a natural repugnance against admitting such testimony. Insofar as this is limited to compulsion on one spouse to testify against the other, this position is well taken—but it relates only to the privilege of the witness-spouse. There is no inherent or natural antipathy to permitting a spouse to testify adversely, where she is willing to appear. Frequently, the most unjust results come about because her lips

are sealed. She [2] may not be able to testify where a child (even her own child) has been abused, ravished, or even killed. Her testimony may be excluded where she is the only witness to prove the most vicious acts of her husband toward other people. The wrongdoer should not have the power to silence her testimony if she is willing to give it.

The principal reason which has been advanced in support of the defendant's privilege is that it tends to preserve marital peace. In practice, this consideration usually has no application, because the question only arises where the spouse is willing to testify (as in the instant case) and the spouse is not ordinarily willing until there is no longer any marital peace to preserve. Moreover, the principle leads to various extreme results, for example in bigamy trials, where the very issue to be determined is the same issue determining the admissibility of the testimony of one "wife" or the other. Usually the testimony of the second "wife" is admitted, giving her a right greater than that of the true and lawful wife. The same reasoning admits the testimony of a mistress, while shutting the door to that of the true wife.

There are various other discrepancies between reason and practice. From the first it was recognized, as a matter of necessity, that the wife should be allowed to testify to corporal wrongs inflicted on her by her husband. This was extended to other wrongs affecting the conjugal relation, and, more liberally in other jurisdictions, to all cases where the rights of husband

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[2] Ordinarily, it is the wife who is the witness and the husband who is the accused.

and wife are opposed. Where the exception because of "necessity" has been held to its limited common law scope, it has led to the harsh results mentioned above.

C. The great weight of authority among writers on the subject favors abrogation of the defendant's privilege. From the time of Jeremy Bentham to the present very few have defended a rule which often leads to injustice. The rule in countries following the civil law is that which we urge this Court to adopt—that the testimony of the spouse is not compellable, but is competent. This has also to some degree been recognized as a rational solution in England and in some states.

The decisions of this Court have moved progressively in the direction of rejecting the defendant's privilege. Starting with the orthodox, common law view that there was a disqualification of both spouses (save for the exception said to be based on necessity), the Court later abolished the disqualification of a spouse from giving favorable testimony. *Funk* v. *United States*, 290 U.S. 371. Then it recognized that the privilege to exclude confidential communications between husband and wife had the effect of suppressing relevant testimony and should therefore be given a strict construction. *Wolfle* v. *United States*, 291 U.S. 7. And it went to the verge of deciding the question here presented when it held that, in view of Rule 26, the common law privilege against adverse spousal testimony should not be recognized where the marriage was a sham. *Lutwak* v. *United States*, 344 U.S. 604. Although opinion in the Courts of Appeals

has divided on the exact question, the majority have conservatively held to the view that any further steps in the direction indicated by *Funk* should be taken by this Court rather than by lower courts. However, in this Court there is no occasion for such reluctance. Reason and experience unite to sustain a full rejection of the accused's privilege.

III

In any event, there should be no reversal in the instant case. The separated wife of the accused testified to only one matter of any substance, that she was a prostitute. This appeared abundantly by the testimony of other witnesses. Moreover, whatever slight weight her evidence might have in proof of the government's case was dissipated when petitioner himself testified that he had found out that such was the fact.

ARGUMENT

The issue in this case is a limited one—whether a woman separated from her husband, who is willing to testify against him as to occurrences which are not confidential, should be prevented from doing so because of the defendant-husband's objection. There is no question as to confidential communications between husband and wife during the period of the marital relationship. No attempt was made to adduce from the wife any testimony as to what her husband had told her. Neither is there any issue as to whether a wife, who does not wish to do so, may be compelled to testify against her husband. There is no claim that the wife was testifying against her

will. The single issue is whether the husband has a privilege against his wife's testimony which enables *him* to bar her testimony, even though she herself is willing to testify.

It is the government's position that there is a vast difference between compelling a wife to testify against her husband and permitting her to testify if, of her own volition, she chooses to do so. The valid arguments in favor of the marital privilege against permitting unfavorable testimony are arguments only against *compelling* such testimony. There is no comparable justification for according the accused a privilege to bar the testimony of a willing spouse. In other words, we think the privilege should be that of the witness and not that of the spouse against whom the testimony is offered.

Before giving our reasons for that conclusion, we discuss the power of this Court to formulate rules of evidence in the light of reason and experience. We then suggest why the Court should exercise that power to permit the voluntary testimony of one spouse against the other.

## I.

### This Court Has Broad Power To Formulate Rules Of Evidence For Federal Criminal Trials In The Light Of Reason and Experience

Under Rule 26, F. R. Crim. P., the admissibility of evidence is governed, generally, "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." This is a restatement of principles which

were already fully recognized when the Rule was adopted. A review of the decisions which preceded it show a steady broadening of the scope of the evidence which has been admitted and make clear that the Rule is to be applied with liberality.

The Judiciary Act of 1789, by Section 34, 1 Stat. 73, 92, seemed to lay down a rule of conformity with state law on all matters both of procedural and substantive law.[3] From the first, however, there was a reluctance on the part of the Court to give full effect to its seemingly explicit terms.[4] In *United States* v. *Reid*, 12 How.

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[3] That section provided:

"That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States in cases where they apply."

[4] See, for example, the following cases:

*Robinson* v. *Campbell*, 3 Wheat, 212, 222-223, which held that remedies in the courts of the United States should be "not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles." *Wayman* v. *Southard*, 10 Wheat. 1 (opinion by Chief Justice Marshall), holding inapplicable a Kentucky statute for the relief of debtors by requiring judgment creditors to accept as satisfaction the bank notes of the state bank, because Section 34 of the Judiciary Act of 1789 applied a "rule of decision" during the course of the trial, rather than attempting to affect proceedings thereafter which were ministerial in nature; the applicable rule was held to be the common law in the several states. *Swift* v. *Tyson*, 16 Peters 1, holding that "laws," as used in Section 34, had reference to the statutes and the construction thereof by the state courts and to rights and titles having a permanent locality, but not to questions of a more general

361, 363, it was held that Section 34 did not apply to criminal actions, for the reason that this would "place the criminal jurisprudence of one sovereignty under the control of another"; some certain and established rule must have been in the mind of Congress, "so familiar and well understood in the trial by jury that legislation on the subject would be deemed superfluous" (*id.* at p. 365). This could not have been the common law of England at the time of the Act, because that was a foreign country, nor the law of England at the time of the settlement of the various colonies, because of the abuses which then existed and which had been recognized by adopting the Fifth and Sixth Amendments to the Constitution. Therefore, by process of elimination, the Court concluded that the applicable rules were those in effect in the respective states in 1789, which could be amended by Congress, but not by the states (for federal purposes).[5] When the ques-

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nature, such as those involving commercial law or the law of contracts. (Research by Prof. Warren, as set forth in *History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 86-88, showed, by an examination of the original draft of the act, with its erasures and interlineations, that the legislative intent was apparently to require conformity not only to the statute law, but the common law of the several states. This research led to the eventual overruling of *Swift* v. *Tyson*, and the vast body of law based thereon, in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64.)

[5] Wigmore, in his treatise on *Evidence* (3d Ed., 1940), Vol. 1, Sec. 6, refers to this construction of the Judiciary Act as "singular and indefensible" (p. 175). Indefensible it may possibly be, especially in the light of later progress in the law of evidence, but it was not wholly singular. In the treason trial of Aaron Burr, Chief Justice Marshall, on circuit, had held: "It would seem to me too that the technical term, 'trials at

tion later arose as to what law would be applied in a state admitted to the union since 1789, it was held to be the common law in effect in that state at the time of such admission. *Logan* v. *United States*, 144 U.S. 263, 299, 303.

Shortly afterward, however, the Court decided *Benson* v. *United States*, 146 U.S. 325, and a different trend was begun. This case involved the same evidentiary question as *Reid*, whether a co-defendant who was being tried separately could testify, and it was held that he could. Certain distinctions (not now important) can be pointed out, but the significant change was in the attitude of the Court that it was not necessarily bound by the common law as it may have existed in 1789 or on any other date. It was said, at page 336:

> Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors.

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common law,' used in the section [Section 34] is not correctly applicable to prosecutions for crimes. I have always conceived them to be, in this section, applied to civil suits, as contradistinguished from criminal prosecutions, as well as to suits at common law as contradistinguished from those which come before the court sitting as a court of equity or admiralty." *United States* v. *Burr*, 25 Fed. Cas., No. 14,694, page 188. A disposition to look to the common law of England in determining questions of admissibility of evidence in criminal cases is shown in *United States* v. *Gooding*, 12 Wheat. 460, 469, and in *United States* v. *Murphy*, 16 Pet. 203, 209 (both opinions by Justice Story, who also wrote the opinion in *Swift* v. *Tyson*, *supra*).

> But the last fifty years have wrought a great change on these respects, and today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction.

Therefore, since an 1878 statute made the defendant on trial a competent witness, the Court held that there was no sufficient reason for rejecting the testimony of his co-defendant, who had been granted a severance.

This line of reasoning was carried even further in *Rosen* v. *United States*, 245 U.S. 467, 469, 471:

> In the almost twenty years which have elapsed since the decision of the *Benson Case*, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain.
>
> * * * *
>
> Satisfied as we are that the legislation and the very great weight of judicial authority which

> have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved.[6]

The Court seemed to return for the moment to the standard of *Reid* in *Jin Fuey Moy* v. *United States*, 254 U.S. 189, 195, and in *Olmstead* v. *United States*, 277 U.S. 438, but in *Funk* v. *United States*, 290 U.S. 371, it completely threw off the shackles binding it to the common law of any particular date in determining the rules of evidence. This celebrated case involved the disqualification of a wife to testify in behalf of her husband. The opinion pointed out that *Benson* and *Rosen*, *supra*, were not wholly in conflict with *Reid* and *Logan*, *supra*, but rejected the concept of the two earlier cases that the courts "are still chained to the ancient formulæ and are powerless to declare and enforce modifications deemed to have been wrought in the common law itself by force of these changed conditions" (p. 379). The Court further held that judicial construction and the spirit of legislation had steadily removed the barriers to competency; that the general tendency of legislation both in England and in this country had been to remove the disqualification of the defendant because of interest; and that it was incongruous to retain the disqualification of the defendant's spouse, whose interest was similar

[6] Justices Van Devanter and McReynolds dissented without opinion.

but obviously less. As to the public policy said to support the old rule, Mr. Justice Sutherland said, at page 381:

> And since experience is of all teachers the most dependable and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.

The contention of the government that the responsibility for change in the common law rule disqualifying the spouse rested with Congress was rejected, 290 U.S. at 382:

> Of course, Congress has that power; but if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possess the power, to decide it in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past?

The conclusion was that the reason for the rule of disqualification had ceased to exist and that the common law, with its adaptability to changed conditions, could move forward without waiting for legislative action.

At the same term, the Court decided *Wolfle* v. *United States*, 291 U.S. 7, holding that where a man dictated a letter to his wife, its contents could be testified to by his secretary, based on her stenographic notes.

The Court said, 291 U.S. at page 12, that "rules governing the competence of witnesses in criminal trials in the federal courts * * * are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience."

This language was incorporated almost verbatim into Rule 26, F. R. Crim. P. As the Court recently said in *Lutwak* v. *United States*, 344 U.S. 604, 614, discussing Rule 26:

> Under this rule, the competency of witnesses is to be governed by the principles of the common law as they *may be* interpreted by the courts in the light of reason and experience. The governing principles are not necessarily as they had existed at common law... Congress has not acted, and has specifically authorized this Court to prescribe rules of criminal procedure, but the rules do not specifically answer the problem here. Therefore, it is open to us to say whether we shall go further and abrogate this common-law rule disqualifying one spouse from testifying in criminal cases *against* the other spouse. (Emphasis the Court's.)

A code of evidence could have been formulated by the Court under the Act authorizing the formulation of Rules of Criminal Procedure,[7] but it has preferred

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[7] 18 U.S.C. 3771 provides:

"The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases * * *."

to move forward, a step at a time, by judicial decision. There is no doubt, however, of the power of the Court to lay down a rule that is consonant with its independent concepts of what is now just and practical in the light of reason and experience. The precedents do not bind the Court; they liberate it.

## II

### In The Light Of Reason And Experience, An Accused Should Not Have A Privilege Against The Adverse Testimony Of His Spouse

#### A. *A distinction should be recognized between the right of a spouse to refuse to testify against the other and the right of a court to receive the testimony, as here, of a spouse who is willing to testify.*

At one time there was a blanket exclusion of all spousal testimony. Blackstone (*Commentaries*, Vol 1, 443) stated the reason to be:

> (I)f they were admitted to be witnesses *for* each other, they would contradict one maxim of law "*nemo in propria causa testis esse debet*;" and if *against* each other, they would contradict another maxim, "*nemo tenetur seipsum accusare*".

It is apparent that the "rule" had two parts, resting on different grounds. Favorable testimony was not allowed because, until about a hundred years ago, interested parties were not allowed to testify. The disqualification of a spouse was a logical corollary of the disqualification of the party. When the disqualification of the party was removed by statute, in due time the courts recognized that the disqualifica-

tion of the spouse should also be removed. *Funk* v. *United States*, 290 U.S. 371, discussed *supra*, pp. 18-19.

The part of the rule prohibiting *unfavorable* testimony was at first regarded as inherent in the general disqualification of spousal testimony. Later it was seen that no one had an interest in excluding unfavorable testimony except the spouses themselves, and the right to exclude such testimony was recognized as a privilege. Further, it was said that it was a privilege which belonged to both spouses, so that the consent of both was necessary to render the evidence admissible.

It is this latter part of the "rule", involving the "privilege" rather thar the "disqualification", which is under consideration in the present case. The problem is whether this "privilege" shall be recognized, and if so whose privilege and to what extent.[8] In our view, those seeking reform in the rule as to adverse spousal testimony may have gone too far in attacking the *privilege of the witness-spouse*. The reasons for such a privilege on the part of the witness, and for a privilege on the part of the defendant, are different. We doubt the wisdom of rejecting the *privilege* of the witness-spouse to *refuse* to testify. A deep-seated psychological, and perhaps moral, reluctance to abol-

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[8] Where the orthodox position has given ground, usually the privilege of the accused has still been retained as to so-called "confidential communications" between spouses. As noted at the outset of the Argument, *supra*, p. 12, this aspect of the marital privilege is not involved in this case. Nothing that the wife of the accused said here could possibly be construed as the revelation of a confidential communication.

ishing *this* privilege, together with a failure to differentiate between the privilege of the witness and of the accused, probably accounts for the fact that rejection of the accused's privilege has proceeded slowly although, as we show below, writers have for many years favored that position.

Lord Coke has received over the years the criticism that he confused the disqualification to give favorable evidence for the accused with the privilege against unfavorable evidence (see *infra*, pp. 26, 27). But his critics seem to have continued the confusion to some extent by failing adequately to distinguish between the reasons favoring the privilege of the *accused* with those which support the privilege of the *witness-spouse*.[9] Thus, Professor Wigmore, in criticizing the privilege as a whole, dismisses as sentiment one of the reasons offered in support of the rule, which he phrases thus:

> A second reason, having some plausibility, and well expressed in the language of Mr. Justice Irvin and Mr. Justice Campbell, comes in substance to this, that there is a *natural repugnance* in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life-partner.[9]

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[9] Wigmore, *Evidence*, Sec. 2228, p. 227. A similar view, perhaps inspired by Professor Wigmore, is expressed in the comment to Rule 23(2) of the Uniform Rules of Evidence: "This abolishes the rule, still existing in some states and largely a sentimental relic, of not requiring one spouse to testify against the other in a criminal action."

But we suggest that there is a general reluctance and aversion to *compelling* a man or a woman to testify against his or her life-partner. The right of the spouse to remain silent is akin to the privilege against self-incrimination. For the spouse it can be said, as it was in the *Trial of Lilburn and Wharton*, 3 How. St. Tr. 1315, 1332 (1637):

> [T]his Oath is against the very law of nature; for nature is always a preserver of itself, and not a destroyer: But if a man takes this wicked oath, he destroys and undoes himself, as daily experience doth witness.

The purpose of the privilege against self-incrimination is said to be the "reflection of a humane attitude which saves even the guilty from a harsh choice among perjury, recalcitrance, or confession".[10] A similar attitude would protect the spouse of the accused. Blackstone expressed the idea (but without making the differentiation later developed between the privilege of the accused and the privilege of the witness) when he wrote that if husband and wife were admitted as witnesses *against* each other, that would contradict the maxim that no one should be held to accuse himself.[11]

All this, however, relates to the privilege of the spouse to refuse to testify; it does not relate to the question of whether a spouse who is willing to testify

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[10] Meltzer, *Required Records*, The McCarran Act, *and The Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687, 692-693 (1951) reprinted in *Selected Writings on Evidence and Trial*, Association of American Law Schools, 270, 275.

[11] 1 Blackstone, *Commentaries*, 443, cited *supra*, p. 21.

should be barred from doing so by the assertion of the privilege by the accused. As already indicated, it is the government's position that the marital privilege should be that of the witness, and not of the accused; that there is no adequate reason why the accused should be the one to determine whether unfavorable testimony should be given against him by his willing spouse; and that, in many situations, recognition of a privilege of the accused to bar the testimony of the willing witness-spouse results in situations more unjust than any involved in rejection of the privilege.

### B. *The reasons given for supporting the old rule, which excluded all spousal testimony, are inadequate to justify retention of the privilege on the part of the accused.*

Three principal reasons have been given in support of the privilege of an accused against adverse spousal testimony: (1) the old concept of unity between husband and wife; (2) the preservation of marital peace; and (3) a "natural repugnance" felt at admitting such testimony.[12] See 8 Wigmore, *op. cit.* Sec. 2228, pp. 225-227, *supra.*

1. As pointed out above (*supra*, pp. 23-24), the "natural repugnance" argument (the third reason) goes mainly to the right of the spouse to refuse to testify, a privilege which we agree should be recognized. It has also been said, in Professor Wigmore's statement of the contention, that there is a natural repugnance

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[12] For other suggested reasons, see Connor, *The Qualification of Defendant's Spouse as a Witness in Criminal Cases*, 9 Notre Dame Law Review 272, 273-274 (1934).

"to compelling the culprit to the humiliation of being condemned by the words of his intimate life-partner." We think this has very little merit in the situation where the spouse testifies voluntarily. The accused's predicament is the result of his own wrongful actions and there is no reason why the court should be deeply concerned over the sensitivity of his feelings about who should be allowed to testify against him. Conviction is a "humiliation" in any case.

2. Turning to the first reason, the unity of husband and wife, the authority usually cited as originating the doctrine is Lord Coke, who wrote in 1628:

> *Note*, it hath been resolved by the justices that a wife cannot be produced either against or for her husband, *"qua sunt duae animae in carne una"*; and it might be a cause of implacable discord and dissention between the husband and the wife, and a meane of great inconvenience; * * * [13]

Wigmore, speaking of this passage, says:

> He it was who struck the first false note. He mouthed a few Latin words of mediaeval scholasticism, and suggested a consideration doubtful in its morality and narrow in its view of human nature; and his successors seem to have been satisfied not to improve upon this example.[14]

It is perhaps unhistorical to criticize what was written more than three hundred years ago in the light of subsequent developments of law, morals, and mores. The idea of marital unity was recognized in Coke's time; Bracton had written four hundred years

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[13] Coke, *Littleton*, 6b.

[14] 8 Wigmore, *op. cit.*, Sec. 2228, pp. 224-225.

before of husband and wife "who are as it were one person, being one flesh and one blood".[15] But there can be no question that at the present time this principle has little validity or vitality. Husbands and wives have separate property, may sue each other, and have full political and civil equality. These are not days when rules of evidence can be founded on the concept that husband and wife are one, and that one is the husband.

3. It is on the second reason above given (p. 25), the prevention of marital discord, that the major battle lines have been drawn. This, too, was a basis given by Lord Coke.[16] But this traditional reason has no real validity in a variety of recurrent situations, including the case where the wife is willing to testify:—

(*a*). There is no breach of marital accord where the parties are no longer living together. Such was was situation in *The King* v. *Cliviger*, 2 T.R. 263, 269 (1788), one of the early cases most often cited to support the theory of marital concord. The husband had left his wife, whose testimony was excluded, and had gone off with another woman. The parties were not living together in *Lutwak* v. *United States*, 344 U.S.

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[15] "*qui sunt quasi unica persona, quia caro una & sanguis unus*" 6 Bracton (Twiss, 1883), *Laws and Customs of England* 392, 393.

[16] This reason obviously had no application where a wife wished to testify in behalf of her husband. Excluding her testimony did not contribute to marital peace, but served to disrupt it, by contributing toward his conviction. This was pointed out in 1828 by Livingston, *Complete works on Criminal Jurisprudence*, Vol. 1, p. 456, and again in *Tinsley* v. *United States*, 43 F. 2d 890 (C.A. 8).

604, where the Court decided under Rule 26, in the light of reason and experience, that the privilege against spousal testimony did not exist where the relation of husband and wife was only ostensible. And in the instant case the parties were living apart, further attenuating a conjugal relationship that seems never to have been too substantial.[17] These are not isolated examples. As observed by one commentator:[18]

> Perhaps the most cogent reason of all is that the privilege in no way serves to protect marital harmony, inasmuch as it is ordinarily invoked only when one spouse desires to testify against the other, and where, presumably, the marriage is already on the rocks.

(*b*). Similarly, the supposed reason for the rule has no application where a man is prosecuted for bigamy. The first wife cannot testify as to the fact of the first marriage, or any other fact, because she is, at least *prima facie*, the legal wife and therefore disqualified. But the testimony of the second "wife", whose position in the eyes of the law and society is (to say the least) equivocal, is freely received.[19] The

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[17] Petitioner inadvertently referred to the witness whose testimony is in question as his "ex-wife" and stated, in excuse for his lapse, that they had never lived together very much (R. 46). At the time of the acts complained of, she was living apart from him under an assumed name (R. 8).

[18] *The Search for "Reason and Experience" under the Funk Doctrine*, Comment, 17 U. Chi. L. Rev. 525, 529 (1950).

[19] It is pointed out in 8 Wigmore, *op. cit.*, Section 2231, p. 234, citing *Miles* v. *United States*, 103 U.S. 304, 313, that the husband may be contending that the first marriage was in-

testimony of a mistress is likewise received.[20]

(*c*). If the husband is dead, marital peace cannot be disturbed by compelling his widow to testify, yet there is a "natural repugnance" against denying her the exercise of *her* privilege.[21]

(*d*). Marital peace is as much endangered by a wife's adverse testimony whether the husband is a defendant or may only be incriminated by his wife's testimony. Accordingly, it was first held that the wife's testimony would be excluded in the latter case,[22] but later it was decided that the testimony was admissible, a rule which has been generally followed in this country.[23]

(*e*). The most important situation where marital concord is regarded as an insufficient ground for excluding spousal testimony is where the wrong was committed directly against the spouse. Here an exception was made from the earliest times,[24] but not

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valid and be accorded the privilege as against the second wife. Whether the court allows or rejects such a contention, it has to assume the crucial issue in the case, leading to "inextricable dilemmas" and "unedifying quibbles."

[20] *Batthews* v. *Galindo*, 4 Bing. 610.

[21] See *Stein* v. *Bowman*, 13 Pet. 209, which, however, only hinted at this as a reason.

[22] *The King* v. *Cliviger*, 2 T.R. 263 (1788); *Stapleton* v. *Crofts*, 18 Ad. & El. (N.S.) 367.

[23] *R.* v. *All Saints*, 6 M. & S. 194, 199 (1817); *Baring* v. *Reeder*, 1 Hen. & Mun. 154, 168 (Va.); *State* v. *Briggs*, 9 R.I. 361, 364; *People* v. *Langtree*, 64 Cal. 256, 258, 30 Pac. 813.

[24] See *Trial of Mervin Lord Audley*, 3 How. St. Tr. 401, 414 (1631), admitting such testimony "where the wife is the party grieved, and on whom the crime is committed."

upon the basis that the reason for the rule did not apply. Instead, it was said that there was a "necessity" for receiving the spouse's testimony.[25] But the exception was limited (with some later liberalization in some jurisdictions) to cases of corporal violence directly against the spouse—a restriction which led to some incongruous results. Where a defendant was charged with forging his wife's name, his privilege against her adverse testimony was upheld.[26] Another case upheld the privilege where defendant was charged with stealing his wife's property,[27] and elsewhere it was held that a husband living separately from his wife could not testify where she was charged with burning his home.[28]

Even more startling is the case where defendant took his seven-year-old step-daughter into the woods near their home, ostensibly on some farm chore, and there ravished her. His conviction, based largely on the testimony of the child's mother, was reversed. The court said it would be too narrow an interpretation to confine the exception to cases where there was a physical wrong against the person of the spouse, but it should at least be confined to the cases

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[25] Bentham has his own curious explanation of the "necessity": "A cause between Doe et Ux admits as many fees as a cause between Doe and Roe. In a case where there is nobody to swear for Ux, if Ux were not admitted, there would be no cause, no fees. Rule:—admit her evidence." Bentham, *Rationale of Judicial Evidence* (Bowring's Ed.) Vol. VII, p. 481.

[26] *Ex parte Dickson* 132 S.W. 2d 243, 245 (Mo.)

[27] *Overton* v. *State*, 43 Tex. 616, 618.

[28] *State* v. *McMullins*, 156 Miss. 663, 126 So. 662.

where the wrong directly and vitally affected the conjugal relation, which rape of the child did not.[29] The court felt that relaxation of the rule could lead to unfounded charges as an easy way to bring about termination of the marriage relation.[30]

Many cases hold the same way, in spite of the fact that the mother is frequently the only available witness other than the child herself.[31] In one, the defendant shot and killed his own child in its mother's arms, the bullet passing through the child's head and wounding the wife. Her testimony was held inadmissible to prove the child's murder—an outstanding example of what Bentham calls "the heroic dimen-

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[29] *Cargill* v. *State*, 25 Okl. Cr. 314, 220 Pac. 64. .

[30] This argument had been rejected three hundred years earlier in *Lord Audley's Case*, *supra*, 3 How. St. Tr. 401, 415, where the defendant, charged with certain acts of depravity toward his wife, unsuccessfully urged "That his son was now become 21 years old, and he himself old and decayed; and the one would have his lands, and the other a young husband; and, therefore, by the testimony of them and their servants added to their own, they had plotted his destruction and death."

[31] In *Toth* v. *State*, 141 Neb. 448, 3 N.W. 2d 899, 908, the dissenting judge stated: "The writer of this dissent was district judge for fourteen years and held court in thirty different counties in Nebraska, and, in his opinion, few of the convictions by the jury, or pleas of guilty secured, in incest cases would have been brought about except for the testimony of the mothers in each of the cases of which he has had knowledge." Other cases holding the mother incompetent under similar circumstances are *Lacey* v. *State*, 27 Okl. Cr. 42, 224 Pac. 994; *State* v. *Burt*, 17 S.D. 7, 94 N.W. 409; *Compton* v. *State*, 13 Tex. App. 271.

sions given to the conjugal flame by the sentimentality of * * * lawyers." [32]

A rule offering such advantages to those able to invoke it seems to have led many a person charged with crime to the altar.[33] Whether marital peace results from such unions is to be doubted, but such are the incongruities resulting from the rule that the defendant-spouse can bar the testimony of his mate.

The extreme results of the cases discussed above can perhaps be avoided by giving a more liberal interpretation to the "exception" for crimes against the spouse or the marriage bond, but creating exceptions is an inferior way of dealing with a bad general rule.[34] There is no natural repugnance to permitting a wife to testify to offenses against her child. Nor is there any moral or psychological barrier to permitting a wife *who is willing to do so* from testifying that her husband has repeated to another woman the type of fraud which he practiced against her. See *United States* v. *Walker*, 176 F. 2d 564 (C.A. 2), certiorari denied, 338 U.S. 891. Where the wife is willing to

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[32] Bentham, *Rationale of Judicial Evidence* (Bowring's Ed.), Vol. VII, p. 481.

[33] *State* v. *Chrismore*, 223 Ia. 957, 274 N.W. 3; *Doss* v. *State*, 156 Miss. 522, 126 So. 197 (where the witness' disqualification was accomplished by marrying her, although she was only eleven years old); *Kaul* v. *State*, 43 Okl. Cr. 56, 277 Pac. 278; *Scott* v. *State*, 59 Okl. Cr. 231, 57 Pac. 2d 639; *Moore* v. *State*, 45 Tex. Cr. 234, 75 S.W. 497; *State* v. *McGinty*, 14 Wash. 2d 71, 126 Pac. 2d 1086, 1090. The same has been held in England, *Pedley* v. *Wellesley*, 3 C. & P. 558 (1829).

[34] See Ladd, *A Modern Code of Evidence*, set forth as a comment to the A.L.I. *Model Code of Evidence*, at page 329.

testify to such acts, the resort to marital peace is unrealistic, for at that point marital peace is generally non-existent. See *supra*, pp. 27-28. And against the possibility of some subsequent reconciliation there must be balanced the genuine loss to society caused by a rule which provides that, although the spouse is sufficiently disturbed to be willing to testify, her lips are sealed at the demand of the putative wrongdoer.

We think that most of the problems in this field can be met by ruling that the marital privilege is that of the witness, and not the accused. This creates a standard which has the great advantage of simplicity. It represents a more rational way of dealing with the problem than to continue to nibble from time to time at the old common law rule of incompetency by creating *ad hoc* exceptions. As we show below (*infra*, pp. 33 *ff.*), this view has the support of the civil law, of most writers on the subject, of the laws of some states, and to some extent of tendencies in federal case law.

### C. *The great weight of informed opinion favors rejection of the privilege of the accused.*

Since the solution of this particular problem is to be guided by reason and experience, it is proper that consideration be given to the views of students of the law and the experience of other countries.[35]

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[35] Gray, in his *The Nature and Sources of the Law* (1924), at page 281, stresses the importance of expert opinion and writing in the development of the law:

> Notwithstanding the difference in the comparative weight attached to the opinions of judges and of jurists in the Common and in the Civil Law, it is a matter of

Both sources support the view that there should be no privilege on the part of the accused to exclude adverse spousal testimony.

1. The earliest and certainly one of the most outspoken critics of this particular aspect of the law of "baron and feme" was Jeremy Bentham. In his *Rationale of Judicial Evidence* (Bowring's Ed.) Vol. VII, p. 481 (1828), he wrote:

> A rule like this protects, encourages, inculcates fraud * * * It debases and degrades the matrimonial union; converting into a sink of corruption what ought to be a source of purity. It defiles the marriage contract itself, by tacking to it in secret a license to commit crimes.

Edward Livingston, writing in the same period, omitted from his model code of evidence prepared for the state of Louisiana, but which was designed as appropriate for any state, the common law disqualifi-

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prime importance to observe that in both systems alike the development of the Law has been mainly due, neither to the legislatures on the one hand, nor to the people on the other, but to learned men, whether occupying judicial position or not.

And as was said by Dean McCormick of Northwestern University in *Tomorrow's Law of Evidence*, 24 A.B.A. Jour. 507, 581 (1938):

> In the other fields of procedure we have come to see that the road of progress is the way of comparative study. By examining the results of experiments in other states and countries, and by selecting the devices that have proven successful in practice, a body of knowledge of scientific code-making has been developed, with notable recent results. Comparative research and an open-minded willingness to profit by the experience of others, are the path of improvement in evidence law.

cation of husband and wife and any reference to the privilege. *Complete Works of Edward Livingston on Criminal Jurisprudence*, Vol. 1, p. 456, *et seq.* There is some question whether he was influenced to do so by the writings of Bentham, or whether he arrived at the same conclusion by his own independent line of thought.[36] The same view was adopted by Chief Justice Appleton, of the Supreme Court of Maine, in his treatise.[37]

Professor Wigmore's writing has been the basis for most contemporary comment on the subject. No adequate summary of his strongly asserted views can be given within the scope of this brief, but the following gives some idea of the firmness of his conviction (8 Wigmore, *op. cit.*, Section 2228, p. 224):

> We behold the fantastic spectacle of a fundamental rule of Evidence, which had only questionable reasons for existence, surviving none the less through two centuries upon the strength of certain artificial d o g m a s—pronouncements wholly irreconcilable with each other, with the facts of life, and with the rule itself, and yet repeatedly invoked, with smug judicial positiveness, like magic formulas, to still the spectre of forensic doubt.

The weight of opinion in the legal periodicals is also in favor of abolition of the privilege on the part

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[36] Brosman, *Edward Livingston and Spousal Testimony in Louisiana*, 11 Tulane L. Rev. 243, 255 (1937).

[37] Appleton, *The Rules of Evidence Stated and Discussed* (1860), pp. 144-155.

of the accused.[38] Of more significance in showing the trend of opinion in the legal profession is the report of the American Bar Association's Committee on the Improvement of the Law of Evidence, favoring the abolition of the privilege on the part of the accused,[39] and the omission of the privilege in both the Model Code of Evidence[40] and the Uniform Rules of Evidence,[41] which, however, retain the defendant's privilege as to confidential communications. It has been observed that it is difficult to find any support for the orthodox view among the modern writings.[42]

2. An examination of the codes of a number of

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[38] A partial list of articles and comments follows: Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn. L. Rev. 675 (1929); *Rules of Evidence in Federal Criminal Trials*, 47 Harv. L. Rev. 853 (1934); 35 Mich. L. Rev. 329 (1936); 20 Minn. L. Rev. 693 (1935); 24 Cal. L. Rev. 472 (1936); 10 So. Cal. L. Rev. 94 (1935); 11 Tulane L. Rev. 243 (1937); 38 Va. L. Rev. 359, 362-368 (1952); 30 Boston U. L. Rev. 135 (1950); Weigall, *Evidence of Wife against Husband*, 17 Aust. L. Jour. 3 (1943). Finding the doctrine of the *Funk* case somewhat indefinite are: *The Search for "Reason and Experience" under the Funk Doctrine*, Comment, 17 U. Chi. L. Rev. 525 (1950); *Changes in the Federal Rules of Evidence in Criminal Trials*, 43 Yale L. Jour. 849 (1934).

[39] 63 Reports of American Bar Association 595. The American Bar Association has consistently championed uniform federal procedure. 49 A.B.A. Rep. 491; 55 A.B.A. Rep. 521.

[40] A.L.I. *Model Code of Evidence*, Rules 214-217, pp. 151-157.

[41] Rule 23(2) and Rule 28.

[42] 44 Cal. L. Rev. 945, 946 (1956); 14 La. L. Rev. 427 (1954); 30 Boston Univ. L. Rev. 135, 138 (1950).

civil law countries [43] shows a uniform recognition of the privilege on the part of the witness-spouse to refuse to testify. At the same time, these legal systems do not recognize any privilege on the part of the accused to exclude his spouse's testimony, nor have they given the accused a privilege against his spouse's testifying to so-called confidential communications (which are, however, recognized in the attorney-client, the doctor-patient, and a number of other relationships). In a word, the civil law countries—with a uniformity that is remarkable to practitioners accustomed to endless variations between jurisdictions and to subtle distinctions within a jurisdiction—rule that an accused may not object to his spouse's testimony because of the marital relationship, but that the spouse may refuse to testify on this ground. They give the same privilege of refusing to testify to other close relatives.

3. This rule has received some recognition as a rational solution of the problem both in England [44]

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[43] The codes consulted were the following: France—*Code d'Instruction Criminelle*, Art. 322 (Petites Codes Dalloz, 1957); Germany—*Deutsche Gesetze* (Schoenfelder) Sect. 52 (American translation USAREUR Manual 550-155, 27 Sept. 1955); Italy—*Codici per la Udienza Penale*, Sect. 350 (a cura di Sofo Borghese, 1956); Spain—*Ley de Enjuiciamiento Criminal*, Sect. 416 (Instituto Editorial Reus, 1947); Switzerland—*Procédure Fédérale X*, Arts. 74-77 (Recueil édité par la chancellerie fédérale, 1949).

[44] In England, the problem has been attacked piecemeal, with different statutes applying to different offenses. As to some offenses, the testimony of the spouse is both competent and compellable. As to a larger group, the spouse's evidence is competent only. For a listing of these offenses, see *Evi-*

and in this country.[45]

In the federal courts, there has been a tendency toward abandonment of the privilege claimed for the accused. The common law disqualification of the wife to give testimony favorable to the husband was removed by judicial decision in *Funk* v. *United States*, 290 U.S. 371, discussed *supra*, pp. 18-19.[46] While the

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*dence of Spouses in Criminal Cases*, 99 Solicitors' Journal 551 (1955). See also Weigall, *Evidence of Wife against Husband*, 17 Australian Law Journal 3 (1943). A leading case favoring a statutory construction of spousal competency, but not compellability, is *Leach* v. *Rex*, Appeal Cases (1912), 305.

[45] The statutory provisions of the different states vary from the common law rule of incompetency, with exceptions based on "necessity", to compellability under all circumstances. See 38 Va. L. Rev. 359 (1952); 8 Wigmore, *op cit.*, Sec. 2245, pp. 272-275. The following statutes make spousal testimony competent but not compellable: 15 Code of Alabama, 1940, Sec. 311; General Statutes of Connecticut, Vol. III, 1949, Sec. 8800; General Statutes of Kansas Annotated, 1949 (Corrick), Sec. 62-1420; Kentucky Revised Statutes, 1953, Sec. 421.210; 2 Louisiana Revised Statutes, 1950, Title 15, Sec. 461; 2 Annotated Code of Maryland, 1951 (Flack), Art. 35, Sec. 4; 8 Annotated Laws of Massachusetts, 1956 (Mottla & Hutchins), C. 233, Sec. 20; 3 General Laws of Rhode Island, 1956, Title 12, C. 17, Sec. 10. Two federal statutes of limited application have established this rule: 24 Stat. 635 (1887), relating to polygamy in the Territory of Utah, and 39 Stat. 874, 878, Sec. 4 (1917), 8 U.S.C. 1328, relating to prosecutions for importing aliens for immoral purposes. (38 Boston U. L. Rev. 156, 160, notes that the courts in the New England states favor such a rule.)

[46] In *Stein* v. *Bowman*, 13 Peters 209, the court had sustained the privilege of a widow not to testify against the good name of her deceased husband. Although the language was broader than was required, the holding is one which, for reasons discussed *supra*, pp. 22-24, 29, we believe should still be upheld. Decisions affirming the common law disqualifica-

Court was careful to point out that it was removing the disqualification of a spouse to give favorable testimony and was not passing on the companion question of whether the privilege should also be rejected, nevertheless many of the things said in the opinion were pertinent to both issues. For example, as already pointed out, the Court said that "a rule of evidence should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule" (p. 381), and that the Court has full "power to decide it in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past" (p. 382).

In *Wolfle* v. *United States*, 291 U.S. 7, the Court not only reiterated its power to change common law rules in the light of reason and experience (see *supra*, pp. 19-20), but it also made a significant statement (at page 17) concerning the privilege of a husband to exclude allegedly confidential communications made to his wife:

> The privilege suppresses relevant testimony and should be allowed only when it is plain that marital confidence can not otherwise reasonably be preserved.

See also *Pereira* v. *United States*, 347 U.S. 1, 6.

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tion are *Lucas* v. *Brooks*, 18 Wall. 436, 452; *Hendrix* v. *United States*, 219 U.S. 79, 91, and *Jin Fuey Moy* v. *United States*, 254 U.S. 189, 195. See also *Graves* v. *United States*, 150 U.S. 118. *Bassett* v. *United States*, 137 U.S. 496, is also frequently cited in favor of the orthodox view, although the actual holding was merely that a territorial statute in derogation of the common law rule should be strictly construed.

Finally, *Lutwak* v. *United States*, 344 U.S. 604, went to the brink of deciding the issue here presented, but instead the court said, in exercise of its power under Rule 26, that the common law rule as to the privilege of an accused would not apply where the relationship was only a sham.[47]

The weight of judicial opinion in the circuits has been to adhere to the common law rule recognizing the privilege of the accused, until that rule should be rejected by this Court. These courts have done so, however, without expressing any conviction that the privilege should continue to be recognized. The question was first presented after the *Funk* decision in *Yoder* v. *United States*, 80 F. 2d 665 (C.A. 10). This was a prosecution under the Mann Act. Defendant's former wife (who was not the woman involved in the offense) was allowed to testify for the government. The court pointed out that it could have based its decision on the narrower ground that no privilege existed after divorce, but instead it ruled squarely for rejection of the privilege.[48] The Tenth Circuit has

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[47] Justices Jackson, Black and Frankfurter dissented on this point on the ground that privileged testimony was being used to destroy its own privilege.

[48] The decision has been criticized as dictum, because the case could have been decided on the ground that divorce terminates the privilege. While a majority of cases have so held, such has not been the universal rule. See *State* v. *Kodat*, 158 Mo. 125, 59 S. W. 73, where a divorced wife was not allowed to testify that she saw her former husband shoot at a third party, even though they were separated at the time; *State* v. *Raby*, 121 N.C. 682, 28 S.E. 490; *State* v. *Phelps*, 2 Tyler (Vt.) 374; *Reed* v. *State*, 222 Ark. 119, 257 S. W. 2d 362.

adhered to its view in *Yoder* in *Thouvenell* v. *Zerbst*, 83 F. 2d 1003, 1004, although pointing out the question could not properly be raised in a Section 2255 proceeding. It has also, of course, adhered to that position in the instant case, but also basing its decision on the ground that the wife's testimony was harmless, in any event (see Point III, *infra*, pp. 43-44).

*Brunner* v. *United States*, 168 F. 2d 281, 282 (C.A. 6), involved a situation where a wife was willing to testify that her husband fraudulently accepted a letter addressed to a neighbor lady, containing forty dollars in currency. The Court of Appeals reversed his conviction outright, saying (p. 283):

> Our view is that we must accept the opinion of the Supreme Court in the Graves case as a correct interpretation of the law. It may be that "in the light of reason and experience" the Supreme Court will find it desirable to remove the incompetency of a wife as a witness in a criminal case against her husband, but it has not yet done so.

*United States* v. *Walker*, 176 F. 2d 564 (C.A. 2), certiorari denied, 338 U.S. 891, sustained the privilege on the part of the accused in a case involving successive frauds of similar nature on various women, including the wife whose testimony was largely responsible for his conviction. The majority, speaking through Judge Learned Hand, said:

> We conclude therefore that we should await the choice of Congress between the conflicting interests involved, or such an overwhelming general acceptance by the states of abolition of the priv-

ilege, as induced the Supreme Court to action in Funk v. United States, supra.

While the *Funk* case pointed out that a large majority of state legislatures had abolished the incompetency of the defendant—so that it was irrational to retain the disqualification of the defendant's wife, whose incompetence was based on similar grounds—still the law has gone beyond a mere count of what the various state legislatures have done.[49] Rule 26, F. R. Crim. P., states that questions of competency shall be decided upon the principles of the common law, in the light of reason and experience, without limiting experience to what legislatures have done. Both *Wolfle* and *Lutwak* recognized the plenary power of the Court to lay down its own rule, without waiting for either action by the state legislatures or an express change by Congress. See Point I, *supra*, pp. 13-21. We submit that it is not necessary to wait for explicit action by Congress, because Congress has already expressed its will that the Court should act independently on matters of evidence.[50]

While, as stated above, we think that reason and experience support the view that a spouse should not be compelled to testify against her will, we also believe that neither reason nor experience support the

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[49] The dissent in *Walker* gives a comprehensive view of the decisions leading in the direction of rejection of the privilege and states that Rule 26 imposes a duty on the courts to find a new and rational rule.

[50] By 18 U.S.C. 3771, cited above, providing for formulation of the Rules. See also *McNabb* v. *United States*, 318 U.S. 332, 340.

view that the spouse should not be allowed to testify when she is willing to do so. This Court, we submit, should lay down the rule that the privilege is that of the witness-spouse, and not that of the accused.

## III

### In Any Event, The Challenged Evidence Was Harmless

The Court of Appeals ruled that, even if the testimony of the wife was erroneously admitted, the error was harmless (R. 57-58). The record fully supports this alternative basis of the judgment. The separated wife testified to only two things which in any way bore on the guilt or innocence of the accused: (1) That she had been a prostitute; and (2) that petitioner did not know about it. The latter testimony was, of course, not prejudicial but helpful to accused, so that the only testimony which now has any conceivable importance is her admission that she was a prostitute.

This fact was, however, otherwise proved by uncontroverted evidence. It appeared from the testimony of the hotel clerk, who was in a position to know. See the Statement, *supra*, p. 5. It also appeared from the testimony of Lola Fay Moudy, who told how the witness took her in charge and instructed her as to her work. *Supra*, p. 4. The other girl admitted that she was a prostitute and she was the one who paid Lola Moudy's fine when the latter was unable to contact the witness in question. *Supra*, p. 5. The status of the witness also appeared circumstantially by the fact that she was living at a hotel away from home under an assumed name. See *supra*, pp.

4-5. And whatever significance the testimony might otherwise have had in the government's case was dissipated when petitioner admitted that the witness was a prostitute at the time in question. He testified that he found out definitely that such was the case when he brought Lola Moudy back from Arkansas (R. 47).[51] In the particular circumstances of this case, the testimony of the wife added nothing to the proof of petitioner's guilt, and if error was committed it was harmless.

## CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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SEPTEMBER 1958.

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[51] The fact that Jane Wilson (*i.e.*, Erma Lane Hawkins) was petitioner's wife had been repeatedly referred to by petitioner's counsel himself in cross-examination of Lola Fay Moudy, the complainant witness. (Tr. 21, 22, 23).

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